82-1881

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

JOHN DOE,

Petitioner,

VS.

EXECUTIVE SECURITIES CORPORATION, By CAMERON F. MACRAE III, As Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented [*]

Petitioner is an attorney licensed to practice law in the Cayman Islands, B.W.I., where disclosure of business information is a crime. Petitioner nevertheless testified before a grand jury in the Southern District of New York in specific reliance on the grand jury secrecy provisions of Fed. R. Crim. P. 6(e) and on assurances by Assistant United States Attorneys that his testimony would not be made public. In spite of Rule 6(e) the Court of Appeals authorized disclosure of petitioner's testimony to a trustee appointed pursuant to the Securities Investor Protection

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[*] In addition to petitioner and respondent, the United States was a nominal party in the Court of Appeals and the District Court, but took no position on the merits and filed no briefs in either court. Nevertheless, the Solicitor General has been served with a copy of this petition.

Act for use in a civil lawsuit for money damages against a third party now pending in the Cayman Islands. In doing so, the Court of Appeals, without having found any abuse of discretion, reversed a discretionary finding by the District Court that respondent had failed to demonstrate a "particularized need" for petitioner's testimony sufficient to override the public's interest in preserving the secrecy of federal grand jury proceedings necessary to encourage potential witnesses before future grand juries to come forward voluntarily and testify candidly. The question presented is:

Did the Court of Appeals correctly apply this Court's precedent (e.g., Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 221 (1979); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); Dennis v. United States, 384 U.S. 855 (1966)) in reversing a discre-

tionary finding by the District Court that respondent had failed to demonstrate a "particularized need" sufficient to override the public's institutional interest in preserving the secrecy of grand jury proceedings and authorizing disclosure for use in a private civil action for money damages of a transcript of petitioner's grand jury testimony, the disclosure of which would subject petitioner to prosecution in the Cayman Islands?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: Page

NO.

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JOHN DOE

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, identified here and in the opinion of the Court of Appeals as John Doe to shield his identity,

respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit entered March 11, 1983, and the order denying petitioner's petition for rehearing and suggestion for rehearing en banc entered on April 22, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 702 F.2d 406 (2d Cir. 1983) and is reproduced in full in Appendix A hereto. The memorandum decision and order of the District Court, which was reversed by the Court of Appeals, is unreported and is reprinted in full in Appendix B. The order of the Court of Appeals denying the petition for rehearing and the suggestion for rehearing en banc is reproduced in Appendix C.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The decision of the Court of Appeals was entered on March 11, 1983, and the order denying petitioner's timely petition for rehearing was entered on April 22, 1983.

STATUTE INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6 The Grand Jury

(e) Recording and Disclosure of Proceedings.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before

the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to-

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utililze that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made-

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at

the request of the defendant, upon showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the Cayman Islands, B.W.I. and in Alberta, Canada. He is a member of the bar in good standing. Petitioner is neither a citizen nor a resident of the United States. While attending a course of religious instruction within the United States, however, petitioner was

served with a subpoena compelling his attendance before a grand jury in the Southern District of New York.

Petitioner was aware of the provisions of the Confidential Relationships (Preservation) Law of 1976 (Law 16) (Cayman Islands), as amended by Law 26 of 1979 which, inter alia, make it a criminal offense to divulge any information regarding the finances, securities, or other equitable claim or interest of a business without the consent of the "principal." The grand jury sought disclosure of information from petitioner which would subject him to prosecution under this statute in the Cayman Islands.

Petitioner retained counsel to represent him with respect to the subpoena. Counsel and petitioner then negotiated an agreement with the then Assistant United States Attorneys for the Southern District of New York who caused the subpoena to be issued on

behalf of the grand jury. The agreement provided that petitioner would not move to quash the grand jury subpoena and would testify before the grand jury in specific reliance on assurances by the Assistant United States Attorneys that petitioner's testimony would, as a matter occurring before the grand jury, be secret and not subject to disclosure. Accordingly, the authorities in the Cayman Islands would not be advised that appellee had testified, nor would they be able to learn what testimony he might give. The prosecutors also agreed that should they later want petitioner to testify in open court, they would apply, with petitioner's cooperation, to the court of appropriate jurisdiction in the Cayman

Islands for an order pursuant to the Confidential Relationships (Preservation) Law of 1976, as amended, authorizing petitioner to testify in public.

Nevertheless, in early 1981, the Assistant United States Attorney in charge of the case, without notifying appellee or his attorney, sought and obtained from the District Court an ex parte order pursuant to Fed. R. Crim. P. 6(e) authorizing disclosure to respondent of grand jury documents and the transcript of petitioner's testimony.

Asserting that action to be in direct contravention of the explicit oral agreement made with the prosecutors, petitioner's attorney filed a motion to vacate the disclosure order and to safeguard the secrecy of petitioner's testimony. A hearing was held on petitioner's motion, but the matter was held abeyance pending a potential settlement between the parties. An agreement was reached, and the issue was rendered moot. Petitioner's motion was never decided. The District Judge thus never reached the merits of petitioner's motion, nor did he even consider whether respondent had demonstrated a "particularized

need" or "compelling necessity" for disclosure of petitioner's grand jury testimony.

A consent order was entered on April 29, 1981 wherein petitioner's attorney stipulated that:

> So long as [petitioner] and his law firm concede and do not deny in any litigation in the Cayman Island that insofar as their knowledge extends, Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A., the United States Attorney for this District shall not release or divulge to any person or entity the transcript of any testimony by [petitioner] before a federal grand jury on December 1, 1980. It is further
>
> ORDERED that no disclosure of any transcript of any grand jury testimony by [petitioner] shall be made without further order of this Court upon ten days' notice to undersigned counsel for [petitioner].

On May 5, 1981 respondent commenced an action in the Grand Court of the Cayman Islands in which it alleged, inter alia, that Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A. ("Bland"). Petitioner's law firm, in which petitioner is an inactive partner, represents Bland and Averell in that Cayman Islands action. The formal Statements of Defence, equivalent to an Answer, served by petitioner's law firm contained the following, inter alia:

> [N]o admission is made as to the identity of the beneficial owner of the issued shares of [Bland].
>
> Any disclosures as to the beneficial owner of the issued shares in [Bland] would be in breach of the Confidential Relationships (Preservation) Law.

Petitioner, as soon as he learned that his law firm had failed to concede that Averell was the beneficial owner

of Bland, contacted his firm and asked them to seek authorization from Bland and Averell to amend the pleadings and to make the concession. Petitioner was unable to secure an amendment, because the clients refused to permit their attorneys to do so.

Respondent, on September 14, 1982, served and filed a motion for an order authorizing disclosure to it of petitioner grand jury testimony on the sole ground that petitioner had failed to comply with the consent order of April 29, 1982. Petitioner opposed the motion, asserting that respondent had not demonstrated a "particularized need" or a "compelling necessity" to warrant breaching grand jury secrecy.

By a memorandum and order dated October 26, 1982, the District Court denied respondent's motion. The District Court rejected respondent's argument that by failing to abide by the April 29, 1981 consent order, petitioner had effectively waived any

rights he might have to challenge disclosure of his grand jury testimony, terming that argument "contrary to the overwhelming case law adamantly safeguarding the secrecy of the grand jury." (App. B. p. 13b). The Court held that the stipulation was ineffective, because:

> [I]t is for the courts and not witness to determine whether testimony should be made public....Regardless of the good faith intent of the parties, [they] are incapable of enforcing the stipulation without demonstrating, as all successful moving parties must, a particularized need for the testimony that outweighs the public interest in maintaining the veil of secrecy. [Otherwise], secrecy of grand jury proceedings would be reduced to a farce and would be controlled by attorneys who properly represent the best interests of their clients but not the grand jury investigative system as a whole. (App. B. pp. 13b-14b). (citation omitted).

The District Judge then turned to an examination of whether appellant

had demonstrated a "particularized need" for the grand jury minutes. Applying Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), the Court not only considered whether respondent had shown a need for the transcripts in the Cayman Islands litigation, but also weighed respondent's financial interest in the litigation "against the societal interest in maintaining confidential grand juries." (App. B. pp. 15b-16b) (footnote and citation omitted). "Intertwined with the public interest," the Court wrote, "is also [petitioner's] interest in avoiding criminal prosecution. If his testimony is disclosed, it subjects [petitioner] to a potential prison term and/or a fine....The fear of prosecution is neither remote nor speculative; the Cayman Attorney General is aware of this civil case...." (App. B p. 16b).

[Petitioner] realized that his testimony might have criminal repercussions in the Cayman Islands....Nevertheless, [petitioner] relied on (i) the time-honored principle of grand jury secrecy, (ii) the case of In re Grand Jury Proceedings (Field), 532 F.2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976) (witness must testify before United States grand jury even though it could subject him to criminal punishment in the Grand Cayman Islands), and (iii) the assurances of confidentiality from [the Assistant United States Attorney], and decided not to move to quash the grand jury subpoena.

Encouraging voluntary and candid testimony before the grand jury, as mentined supra, is essential to our grand jury system. Ordering disclosure in this case would serve to frustrate this system. (App. B. pp. 16b-17b).

***

> Even if the information sought by the [respondent] is not available from other sources, a hypothesis strongly contested by the [petitioner], the need applicant has demonstrated for [petitioner's] testimony does not outweigh the public need to retain secret grand jury proceedings. If the contested testimony were released to aid a private party in a civil litigation to reduce its liabilities, then Fed. R. Crim. P. 6(e)(3)(c) would be reduced to mere extension of the already broad federal discovery rules. The public interest in maintaining secrecy and thus upholding the integrity of the grand jury systems outweighs the need of the applicant to establish the beneficial ownership of Bland. (App. B. pp. 18b-19b). (footnote omitted).

On appeal by respondent, the Court of Appeals reversed the District Court, holding that petitioner had waived

whatever personal rights he may have had in preserving the secrecy of his grand jury testimony and that, in light of petitioner's reduced privacy interest, the public's interest in encouraging future witnesses to come forward and testify before other grand juries was not impaired (App. A. pp. 12a-13a). The Court of Appeals further held that respondent, as trustee appointed at the request of the Securities Investor Protection Corporation ("SIPC") pursuant to the Securities Investor Protection Act (15 U.S.C. §§ 78 aaa et. seq.), was entitled to "added consideration when they seek the release of grand jury records." (App. A. pp. 15a-16a).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FAILED TO FOLLOW APPLICABLE PRECEDENT OF THIS COURT WHICH REQUIRES THAT THE DISTRICT COURT BE AFFIRMED EXCEPT FOR AN ABUSE OF DISCRETION

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 228 (1979), held that decisions by a District Court granting or denying disclosure of grand jury transcripts pursuant to Fed. R. Crim. P. 6(e) may be reversed only for an abuse of discretion.

The Court of Appeals nevertheless reversed the judgment of the District Court merely by disagreeing with it. (App. A). There is no discussion anywhere in the Court of Appeals opinion whether the District Court

abused its discretion. Nor is there any holding to that effect. It thus appears that, contrary to this Court's decision in Douglas Oil, supra, 441 U.S. at 228, the Court of Appeals did not give proper deference to the exercise of discretion by the District Court, but usurped its function and merely substituted its own desires instead.

Had the Court of Appeals applied the correct standard, it would have affirmed the judgment of the District Court, for respondent had failed to demonstrate a "particularized need" for release of petitioner's grand jury testimony.

Respondent's only claim of "compelling necessity" is that it will have a more difficult time proving its civil case in the Cayman Islands without appellee's transcript. Respondent argued below that the other sources available to it for obtaining the desired evidence such as interroga-

tories and depositions, would be futile. Yet respondent never even attempted to employ the discovery vehicles, or other judicial remedies available to it in the Cayman Islands, to see whether they would be successful.

The Court of Appeals accepted respondent's futility argument (App. A. p. 20a n.6) and, weighing respondent's "need for the grand jury testimony against the minimal interest in maintaining grand jury secrecy in this case," concluded that respondent was entitled to release of petitioner's testimony. (App. A p. 17a).

The District Court, relying on Douglas Oil, supra, had held that the public interest in grand jury secrecy far outweighed respondent's interest in prosecuting a civil damage action.

> Even if the information sought by [respondent] is not available from other sources,

> a hypothesis strongly contested by [petitioner], the need [respondent] has demonstrated for [petitioner's] testimony does not outweigh the public need to retain secret grand jury proceedings. If the contested testimony were released to aid a private party in a civil litigation to reduce its liabilities, then Fed. R. Crim. P. 6(e)(3)(c) would be reduced to mere extension of the already broad federal discovery rules. The public interest in maintaining secrecy and thus upholding the integrity of the grand jury systems outweighs the need of [respondent] to establish the beneficial ownership of Bland. (App. B. pp. 18b-19b) (footnote omitted) (emphasis supplied).

The Court of Appeals, however, denigrated this societal interest in the confidentiality of grand jury proceedings, holding that future grand jury witnesses "can be assured that their desire for secrecy will be given all due consideration" as long as they do not waive their rights (App. A

p. 13a). The Court of Appeals similarly gave short shrift to those future witnesses who might well hear only of the breach of grand jury secrecy and not of petitioner's so-called waiver. The Court of Appeals relied upon the Jencks Act (18 U.S.C. § 3500(e)(2) (1976) which requires disclosure to the defendant in a criminal trial after the witness has testified on direct pertinent portions of the witness' grand jury testimony. The citation totally ignores the facts of this case and the impact of the Court of Appeals decision on future grand jury witnesses.

> For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries. Persons called upon to testify will consider the likelihood that their testimony may one day be disclosed to outside parties. Fear of future retribution or social stigma

> may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of its duties. Douglas Oil Co. v. Petrol Stops Northwest, supra, 441 U.S. at 222.

As the District Court found, petitioner, a citizen and resident of the Cayman Islands, had forgone the right to move to quash his subpoena on the ground that his testimony would incriminate him in his native country in specific reliance on the secrecy provisions of Rule 6(e) and on the promises of the Assistant United States Attorneys that his testimony would be kept confidential. To say under these circumstances that appellee had "waived his right to object to the release of [his grand jury testimony]" and that "[p]rospective witnesses can be assured that their desire for secrecy will be given all due consi-

deration, as long as they do not enter into a similar waiver," (App. A. pp. 12a-13a), is to tell all future witnesses from countries with laws making disclosure of business information a crime that they cannot rely on grand jury secrecy in the United States. 1/

The unfairness of ordering disclosure of petitioner's testimony and the deleterious impact upon future

1/ The Court of Appeals disposed of petitioner's fear of prosecution in the Cayman Islands, which the District Court found to be "neither remote nor speculative" (App. B. p. 16b), by stating that petitioner was aware of that risk when he entered into the stipulation resealing his transcript. This position of the panel, as the District Court in its discretion found, would serve not to encourage people to come forward and give voluntary and candid testimony before the grand jury, but only to frustrate the system. (App. B. p. 16b).

grand jury witnesses, are apparent from the record. Petitioner agreed to testify before the grand jury in the first instance in specific reliance on an agreement with the Assistant United States Attorneys that

(a) petitioner's testimony would be secret and not subject to disclosure; accordingly the authorities in the Cayman Islands would not be advised that petitioner had testified, nor could they learn what testimony he would give; and

(b) should the prosecutors later require petitioner to testify in open court, they would apply the Court of appropriate jurisdiction in the Cayman Islands for an order authorizing

petitioner to testify.[2/] This agreement was breached by the Assistant United States Attorney when he went ex parte to a District Judge and obtained the order disclosing petitioner's testimony.

The clear message to potential witnesses before future grand juries is, "Don't testify! You cannot rely on the secrecy provisions of Rule 6(e). Worse, you cannot rely on

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2/ Such orders are specifically provided for Section 3A of the Confiddential Relationships (Preservation) Law of 1976 as amended. This agreement also negates the Court of Appeals point that "every sophisticated grand jury witness" knows that if he testifies at trial his testimony will become public under the Jencks Act, 18 U.S.C. § 3500(e)(2). Indeed, that would not occur with a witness who is beyond the subpoena power of the Court. Before testifying publicly, petitioner would have obtained a protective order of court.

the representations of officials of the United States government and officials of the Court!" For that reason, the District Court, in its discretion, held that respondent had not made sufficient showing of "particularized need" to outweigh the public's interest in grand jury secrecy. In reversing the District Court, without finding it had abused its discretion, the Court of Appeals failed to follow the binding precedent of this Court in Douglas Oil Co. v. Petrol Stops Northwest, supra.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
May 18, 1983

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 796 - August Term, 1982

Argued: January 7, 1983

Decided: March 11, 1983

Docket No. 82-6286

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IN RE APPLICATION OF
EXECUTIVE SECURITIES CORPORATION.

EXECUTIVE SECURITIES CORPORATION,
by CAMERON F. MacRAE III, as Trustee,
Applicant-Appellant,

v.

JOHN DOE,

Objector-Appellee.

- - - - - - - - - - - - - - - - - - - -

Before: KAUFMAN, TIMBERS, and NEWMAN,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) denying an application to release the transcripts of a witness's grand jury testimony.

Reversed and remanded.

Eric H. Moss, New York, N.Y. (LeBoeuf, Lamb, Leiby & MacRae, New York, N.Y., on the brief), for appellant.

William M. Brodsky, New York, N.Y. (Baden Kramer & Huffman, New York, N.Y., on the brief), for appellee.

(Paul Gonson, Solicitor, Securities and Exchange Commission, Washington, D.C., submitted a brief for amicus curiae Securities and Exchange Commission.)

NEWMAN, Circuit Judge:

This is an appeal from an October 26, 1982, order of the United States District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) denying an application under Fed. R. Crim. P. 6(e)(3)(C)(i) for the release of the testimony of a grand jury witness. The Court ruled that the applicant in this case, who was acting as trustee for the liquidation of Executive Securities Corporation, had not established a particularized need for the testimony. We conclude that the District Court overestimated the harm that would be done by releasing the testimony in this case and underestimated the applicant's need for the materials. We therefore reverse the District Court's order and remand the matter.

On February 14, 1975, appellant Cameron F. MacRae was appointed trustee for the liquidation of Executive Securities Corporation, a finan-

cially distressed broker-dealer. Pursuant to the Securities Investor Protection Act of 1970 § 5(b)(3), 15 U.S.C. § 78eee(b)(3) (1976 & Supp. IV 1980), MacRae was nominated to be trustee by the Securities Investor Protection Corporation (SIPC), a corporation established by Congress, and was appointed by order of the United States District Court for the Southern District of New York (Charles H. Tenney, Judge). As trustee of Executive Securities, MacRae possessed powers and duties comparable to those of a trustee for a debtor forced into Chapter 7 liquidation under the Bankruptcy Code. See 15 U.S.C. § 78fff(b) (Supp. IV 1980).

While serving as trustee, MacRae came to suspect that Richard O. Bertoli, former president of Executive Securities, had defrauded the corporation and its creditors. To recoup the losses caused by this fraud, MacRae filed suit against Bertoli alleging $2.8 million dollars of damages.

Executive Securities Corp. v. Bertoli, 77 Civ. 714 (MJL) (S.D.N.Y.).[1/] MacRae's suit against Bertoli was filed on February 14, 1977, and still awaits trial in the Southern District of New York. The pace of litigation has been slowed by Bertoli's persistent claims that he is impoverished and will not be able to pay any judgment rendered against him.

In April 1981, the United States Attorney gave an unexpected boost to MacRae's suit against Bertoli by making an ex parte application to the Southern District of New York (Morris E. Lasker, Judge) for the release of certain grand jury testimony and related materials. The grand jury records, which Judge Lasker released to the trustee, revealed that Bertoli had fraudulently transferred $210,000 of stock held by a subsidiary of Executive Securities to Bland Investments, S.A., a Cayman Islands corporation. The transfer took place between 1977 and 1980, a period throughout which Bertoli was pleading

impoverishment in the District Court. A crucial component of the grand jury records was testimony by the appellee in this case, a witness whom we call John Doe. Doe, an officer of Bland Investments and a Cayman Island attorney, testified that the beneficial owner of Bland was Alfred B. Averell, a close associate of Bertoli's and former vice-president of Executive Securities. In light Doe's testimony and the close relationship between Bertoli and Averell, MacRae had a substantial claim under the Cayman Islands law of fraudulent conveyances to recover the $210,000 that Bertoli had transferred to Bland Investments. With Doe's grand jury testimony in hand, MacRae began preparations to institute appropriate action in the Cayman Islands courts.

Before MacRae could file suit, however, counsel for Doe appeared before the Southern District of New York (David N. Edelstein, then Chief Judge) with an application to reseal the witness's testimony. While the

Court was considering Doe's application, lawyers for the witness and MacRae agreed to reseal the testimony with a stipulated order, which Judge Edelstein subsequently endorsed. The record was resealed on the following terms:

> [A]s long as [Doe] and his law firm concede and do not deny in any litigation in the Cayman Islands that insofar as their knowledge extends, Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A., the United States Attorney for the District shall not release or divulge to any person or entity the transcript of any testimony by [Doe] before a federal grand jury on December 1, 1980.

The order also specified that a further order from the District Court would be necessary to reopen the sealed record.

Armed with the stipulated order, MacRae began efforts in the Grand Court of the Cayman Islands to recover the fraudulently transferred assets. Counsel from Doe's firm, representing both Bland Investments and Averell, promptly breached the condition of the consent order by denying that Averell was the beneficial owner of Bland Investments. Counsel from Doe's firm also counterclaimed against MacRae for $210,000 alleging wrongful interference with Bland Investments' business affairs.

MacRae thereupon returned to the Southern District of New York to request that Doe's grand jury testimony be reopened. Local counsel for Doe opposed MacRae's application. MacRae initially argued that the District Court (Kevin Thomas Duffy, Judge) should release the records without further adjudication because Judge Edelstein's order was self-executing as soon as Doe or his law firm denied that Averell was the beneficial owner

of Bland Investments. The District Court rejected this argument on the ground that a witness may not stipulate to the release of grand jury testimony. The Court ruled that the judiciary should determine whether an application has established a "particularized need" for the records that outweighs the public's interest in maintaining grand jury secrecy. See Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); Dennis v. United States, 384 U.S. 855, 872 (1966); United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).

Applying the balancing test outlined in Douglas Oil, supra, the Court concluded that the societal interests in ensuring grand jury secrecy outweighed MacRae's interest in using Doe's testimony to recover assets for Executive Securities and its creditors. According to the District Court, the release of the grand jury records would discourage potential witnesses from testifying before

grand juries in the future. The District Court concluded that the release would be particularly damaging in this case because Doe might well be prosecuted under the Cayman Islands Confidential Relationship (Preservation) laws for revealing the identity of the principals of Bland Investments, were his grand jury testimony to become public. Judge Duffy therefore denied MacRae's application to release the grand jury records.

II.

We agree with the District Court that witnesses do not have the prerogative to effect the release of transcripts of their own grand jury testimony. But cf. In re Grand Jury Investigation, 610 F. 2d 202, 217 (5th Cir. 1980) (witness may discuss his grand jury testimony). The Supreme Court made clear in Douglas Oil and its predecessors that the secrecy of grand jury records serves many interests in addition to those of witnesses who

happen to testify before any particular grand jury.

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil, supra, 441 U.S. at 219; see United States v. Procter

& Gamble, supra, 356 U.S. at 681 n.6 (quoting United States v. Rose, 215 F. 2d 617, 628-29 (3d Cir. 1954)). Clearly, the judiciary cannot depend upon a grand jury witness to assess all of these considerations.[2/]

We disagree with the District Court, however, in its conclusion that, because Doe could not effectively agree to release his testimony, his stipulation was without legal significance. We find it highly significant that Doe agreed to the release of his testimony in the event that his law firm ever denied that Averell owned Bland Investments. Doe entered into this consent agreement with full knowledge of the risk of prosecution under Cayman law if a breach of the agreement were to result in release of his testimony. [3/] By using the agreement to secure Judge Edelstein's granting of the motion to reseal, Doe waived his right to have another District Judge consider whatever interest he personally might have

in keeping his grand jury testimony secret. Doe's agreement to have his testimony resealed if his law firm denied Averell's ownership distinguished him from an ordinary grand jury witness seeking to keep testimony secret. See United States v. Dennis, supra, 384 U.S. at 871-72 & n.18 (courts should consider only the rationales for grand jury secrecy that apply to the records at issue).

The District Court was concerned that the release Doe's testimony would discourage future witnesses from volunteering their testimony to other grand juries. We believe that releasing the records in this case will have no such effect. Doe waived his right to object to the release of the records. Respective witnesses can be assured that their desire for secrecy will be given all due consideration, as long as they do not into a similar waiver.[4/]

Other traditional justifications for grand jury testimony are inapplic-

able in this case. There is no risk that members of the grand jury that heard Doe testify will be influenced by the release of the transcript, because the grand jury is no longer sitting.[5/] See In re Grand Jury Investigation (Sells), 642 F.2d 1184, 1192 (9th Cir. 1981), cert. granted 102 S. Ct. 2034 (1982) (No,. 81-1032); United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980). Moreover, MacRae has agreed to have the names of the grand jurors redacted from the record prior to release. Release of the records in this case will provide no warning to the target of the investigation, Albert Averell, who already knows about the grand jury inquiry and, in fact, has returned to New York to appear before the District Court to oppose the release of the records.

The only remaining interest in maintaining grand jury secrecy in this case stems from the possibility that Averell's reputation might be tainted by the release of the news

that he was under grand jury investigation. While we do not discount the significance of this concern, particularly for Averell, this single interest does not suffice to bar disclosure.

Against the minimal public interest in grand jury secrecy must be weighed MacRae's need for the records. The District Court found MacRae's interest to be no more than that of any private party who seeks to prevail in civil litigation. We cannot accept this assessment. In seeking Doe's grand jury testimony, MacRae appears in his capacity as a SIPC trustee. He appears before the District Court in order to further the congressionally-mandated purpose of protecting the investors, who placed their assets with Executive Securities Corporation, and the SIPC, which insured those investors. See Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 417 (1975). Although not formally part of the federal government, the SIPC and its trustees vindicate important

public interests. We have previously recognized that parties who represent such interests should receive added consideration when they seek the release of grand jury records. See, e.g., United States v. Sobotka, supra, 623 F.2d at 768. But see In re Grand Jury Proceedings (Miller), 687 F.2d 1079, 1091-92 (7th Cir. 1982); In re Grand Jury Investigation (Sells), supra, 642 F.2d at 1191-92. Although MacRae's status as a SIPC trustee does not, without more, establish his entitlement to release of Doe's grand jury testimony, see In re Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 36 (2d Cir. 1981), petition for cert. filed, 50 U.S.L.W. 3717 (U.S. Feb. 17, 1982) (No. 81-1595), it is a factor to be weighed in the Douglas Oil balancing test.

One further consideration in favor of releasing the records is the risk that MacRae might be found liable for the $210,000 counterclaim brought against him in the Cayman Islands

court for wrongfully interfering with the business affairs of Bland Investments. Without Doe's testimony, MacRae might not be able to establish that he had good reason to believe when he brought his suit that it would be successful.

Measuring MacRae's need for the grand jury testimony against the minimal interest in maintaining grand jury secrecy in this case, [6/] we conclude that the applicant is entitled to the release of the records.

The order of the District Court is reversed and the cause remanded for further proceedings consistent with this opinion.

FOOTNOTES

1/ Although MacRae's civil action is still pending, Bertoli has since been enjoined from engaging in broker-dealer activities by the Securities and Exchange Commission and has been convicted after pleading nolo contendere to related criminal charges filed in the United States District Court for the District of New Jersey. United States v. Bertoli, 77 Crim. 236 (D.N.J.).

2/ Any significant public interest in maintaining the secrecy of grand jury records is normally asserted by the United States Attorney. The Government informed us at oral argument that it takes no position on the release of Doe's testimony. The United States Attorney did, however, initiate the release of Doe's testimony in 1981.

3/ The District Court indicated that MacRae was on notice that Doe might be prevented from complying with his agreement by Cayman law. Our review of the record reveals that the only time Doe's counsel metioned this difficulty was during an in camera session with Judge Edelstein, at which neither MacRae nor his counsel was present.

4/ Alternatively, it might be argued that, regardless of Doe's waiver, any release of grand jury testimony will deter future witnesses who might hear of the fact of release in this case without also learning of the particulars of the application. At one time, when the release of grand jury testimony was a rarity, the argument may have had some force. But now, the 1970 amendment of the Jencks Act has made the release of grand jury testimony of frequent occurrence. See Organized Crime Act of 1970, Pub. L. No. 91-452. § 102(d), 84 Stat. 922, 926 (codified at 18 U.S.C. § 3500(e)(2)

4/ Continued

(1976)). Every sophisticated grand jury witness knows that, if he becomes a witness at trial, his grand jury testimony will most likely be revealed to the public. For future witnesses trying to decide whether to testify before grand juries, the marginal deterrent effect of releasing one more transcript on the facts of this case can only be trivial.

5/ Doe testified before the grand jury in December 1980, and the eighteen-month term of the grand jury, see Fed. R. Crim. P. 6(e), has long since expired.

6/ We accept appellant's explanations why Cayman discovery offers no alternative means of discovering the information revealed in Doe's testimony.

Appendix B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

APPLICATION :

OF :

EXECUTIVE SECURITIES CORPORATION, :

by CAMERON F. MacRAE III, as Trustee, for the Re-release and leave to Use in a Civil Proceeding Certain Grand Jury Transcripts and Records Pursuant to Federal Rule of Criminal Procedure 6(e)(3)(C)(i) and Stipulation of the Persons interested therein. :

- X

M 11-188

MEMORANDUM & ORDER

APPEARANCES:

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Attorney

*/ This memorandum decision was originally filed under seal. Upon publication of the Court of Appeal's opinion everything in this opinion was made public, except the identity of petitioner. Accordingly, petitioner's name has been deleted in the body of this memorandum. And the pseudonym "John Doe" used by the Court of Appeals has been substituted.

KEVIN THOMAS DUFFY, D.J.:

Cameron F. MacRae III was appointed Securities Investor Protection Corporation ("SIPC") Trustee for the liquidation of the Executive Securities Corporation ("ESC"). In connection with his status as Trustee, applicant MacRae now moves pursuant to Fed. R. Crim. P. 6(e)(3)(C) for disclosure of the grand jury testimony of respondent [John Doe]. For the reasons set forth below, the motion for disclosure is denied.

This motion arises out of the investigation of the financial failure of ESC and the subsequent indictment in the District of New Jersey of Mr. Richard O. Bertoli, ESC's ex-president. Mr. Bertoli pled nolo contendere to all seventy-seven (77) counts of the indictment against him on June 28, 1978. Mr. Bertoli's criminal conduct is alleged to have directly caused the insolvency of ESC and to have resulted in over $2 million in ESC losses.

Applicant and SIPC initiated a lawsuit in this district against Bertoli to recover judgment for these losses. Executive Securities Corp. v. Bertoli, 77 Civ. 714 (MJL). Apparently Bertoli claims impoverishment and "his prospective inability to satisfy any judgment that might be entered against him in the civil action now pending before Judge Lowe." Applicant's Memorandum of Law at 2.

The applicant learned that Bland Investments, S.A. ("Bland"), a Grand Cayman Islands' company, bought and sold securities of Jersey Patents, Inc. generating proceeds of approximately $200,000. Applicant alleges that this money was eventually transferred to Bland's bank account in the Grand Cayman Islands by Messrs. Bertoli and Averell. Mr. Averell is a former vice-president of ESC.

On December 1, 1980, respondent [John Doe] testified before the grand jury in this district. [John Doe]

is a lawyer in the Grand Cayman Islands and a nominal officer and director of Bland. [Doe] testified, before a grand jury apparently focusing on Averell's activities, that Averell was the true and beneficial owner of Bland. It is this testimony which the applicant now wants disclosed.

An assessment of the significance of [Doe's] testimony requires exploration of proceedings pending in the Cayman Islands. Bland had been stricken from the roll of companies in the Grand Cayman Islands for inactivity. [Doe] filed an affidavit in the Grand Cayman courts to have Bland reinstated as a corporation on the Island's roll of companies. It appears that when and if Bland is reactivated, the beneficial owner can obtain any Bland funds, including the $200,000 held in Bland bank account. The applicant seeks to prevent this from occuring by proving that Averell is Bland's true owner and that the money came into Bland's possession as a

result of wrongdoing.

On April 3, 1981, Judge Lasker of this court granted the disclosure application of Assistant United States Attorney Richard A. Mescon [1/] and ordered that [Doe's] grand jury testimony be released to Mr. MacRae and David Barwick, the Attorney General of the Grand Cayman Islands. Mr. Barwick had telexed Mr. Mescon for information relevant to Bland's reactivation application. On April 8, 1981, applicant's counsel appeared before the Grand Court of the Cayman Islands requesting intervention in the pending Bland proceeding. The law firm of..., of which [John Doe] is a name partner, represented Bland on this date. A lawsuit was subsequently commenced in the Grand Court by applicant alleging that the contested funds "are the fruits of a fraudulent transfer of assests by Mr. Bertoli, aided and abetted by his associate, Mr. Averell." Applicant's Memorandum of Law at 5. [Doe's law firm] represent[s] both

Bland and Averell in this lawsuit.

[Doe's] counsel moved before Judge Edelstein, on April 10, 1981, to vacate Judge Lasker's order and reseal [Doe's] testimony. A settlement entered into between the parties obviated the need for judicial resolution of the reseal motion. The consent order, signed by [Doe's] counsel, provided in relevant part:

> ORDERED that, so long as Mr. [John Doe] and his law firm concede and do not deny in any litigation in the Cayman Islands that insofar as their knowledge extends, Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A., the United States Attorney for this District shall not release or divulge to any person or entity the transcript of any testimony by Mr. [John Doe] before a federal grand jury on December 1, 1980. It is further

> ORDERED that no disclosure of any transcript of any grand jury testimony by Mr. [Doe] shall be made without further order of this Court upon ten days' notice to undersigned counsel for Mr. [Doe], and it is further
>
> ORDERED that this order and all the documents and proceedings herein shall be sealed.

Applicant's Exhibit A.

The instant controversy arose when both Bland and Averell, in papers submitted to the Grand Cayman Court prepared by the [Doe's law firm] stated:

> no admission is made as to the identity of the beneficial owner of the issued shares of this defendant [Bland].
>
> Any disclosure as to the beneficial ownership of the issues shares of this defendant would be in breach of the Confidential Relationships (Preservation) Law.

Applicant's Exhibit B at ¶ 4. See Applicant's Exhibit C at ¶ 5.

It appears that Grand Cayman Confidential Relationships Law prohibits the disclosure of any business information without the express or implied consent of the "principal" of the company. Brodsky Affidavit in Opposition, Exhibit D, §§ 2-3. In this case, Bland and Averell, the principals, do not consent to any disclosure. If [Doe] was adjudged guilty of violating this law, he would be subject to a maximum four year prison term and/or a maximum $10,000 fine. Id. at § 4(4).

It is against this factual backdrop that the applicant seeks disclosure of [Doe's] grand jury testimony.

DISCUSSION

The secrecy of grand jury proceedings is necessary to insure that witnesses testify voluntarily. "[W]itnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements," Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979), if confidentiality were not enforced. Moreover, innocent targets of grand jury investigation who were not ultimately indicted would be subject to public scrutiny. See United States v. Procter & Gamble Co., 356 U.S. 677, 681-82, n.6 (1958).

Federal Rule of Criminal Procedure 6(e)(3)(c), though recognizing the general prohibition on grand jury disclosure, allows a district court to order disclosure

(i) when so directed by a court

> preliminarily to or in connection with a judicial proceeding; or
>
> (ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.[2/]

The standard to be followed in resolving disclosure motions is not included in the Rule. However, the Supreme Court has held consistently that this limited intrusion on grand jury secrecy is only permissable when the moving party has established a "particularized need" for the testimony and proven that this need outweighs

the societal interest in confidential grand jury proceedings. Douglas Oil Co. v. Petrol Stops Northwest, 441 at 222; Dennis v. United States, 384 U.S. 855, 872 (1966); United States v. Procter & Gamble Co., 356 U.S. at 683.

With full understanding of the applicable standard which must be met in order to justify disclosure of [Doe's] testimony, the applicant proffers two arguments in support of its motion for disclosure: one. [Doe] waived his right to challenge disclosure of his grand jury testimony by failing to abide by the stipulation between the parties and, two, a compelling and particularized need merits disclosure of the testimony.

1. Waiver of right to challenge disclosure.

It is uncontested that [Doe] entered into the consent stipulation sealing his testimony and that his

law firm later violated that stipulation by refusing in Cayman Island proceedings to admit Averell's beneficial ownership of Bland. Applicant's argument that this violation justifies automatic disclosure of the testimony in issue without regard to the policy reasons behind continued confidentiality is contrary to the overwhelming case law adamantly safeguarding the secrecy of the grand jury. Id.

Applicant's argument in essence substitutes the witness in place of the district court as the protector of the grand jury. The grand jury, however, is an arm of the judiciary and it is for the courts and not the witness to determine whether testimony should be made public. In re Grand Jury Investigation of Cuisinarts, Inc., 665 F. 2d 24, 30 (2d. Cir. 1981). The stipulation in question is thus ineffective. Regardless of the good faith intent of the parties, [Doe] and the applicant are incapable of enforcing the stipulation without demonstrating,

as all successful moving parties must, a particularized need for the testimony that outweighs the public interest in maintaining the veil of secrecy. If the stipulation was enforced and deviation from this well-established standard was allowed, secrecy of grand jury proceedings would be reduced to a farce and would be controlled by attorneys who properly represent the best interests of their clients but not the grand jury investigative system as a whole.

Further support for rejection of the applicant's waiver argument is found in the statement of [Doe's] counsel before Judge Edelstein that [Doe] and his law firm would concede Averell's beneficial ownership of Bland in the Cayman Islands "if it can be appropriately done in proper code in the Cayman Islands." Respondent's Exhibit C at 7. This placed the applicant on notice of potential Caymanian legal problems. [Doe's] waiver of his right to challenge

the disclosure of his testimony is not of overriding concern and does not justify pro forma disclosure; rather I must concentrate on the particularized need, if any, demonstrated by the applicant.

2. Particularized need for [Doe's] testimony.

Applicant argues that the importance of establishing Averell's beneficial ownership of Bland in the Cayman Island proceedings and to prevent disbursement of money allegedly obtained fraudulently justifies disclosure of [Doe's] testimony. [Doe], on the other hand, argues that applicant's well-founded desire to limit its liability does not constitute a particularized need and furthermore that the information requested is available from other sources. In addition, however, to considering applicant's need for this testimony in its Grand Cayman litigation, I must weigh the financial interest of ECS against the societal interest in maintaining confidential

grand juries.[3/] See United States v. Sobotka, 623 F.2d 764, 767 (2d Cir. 1980).

Intertwined with the public interest is also [Doe's] interest in avoiding criminal prosecution. If his testimony is disclosed, it subjects [Doe] to a potential prison term and/or a fine for violating the Confidential Relationships (Preservation) Law. The fear of prosecution is neither remote nor speculative: the Cayman Attorney General is aware of this civil case. See In re Grand Jury Subpoena of Martin Flanagan, No. 82-6058 (2d Cir. Oct. 13, 1982) (mere possibility of foreign prosecution insufficient to avoid contempt for refusal to testify before grand jury); Barwick telexes to Mr. Mescon.

[Doe] realized that his testimony might have criminal repercussions in the Cayman Islands. Respondent's Exhibit B at ¶ 4. Nevertheless, [Doe] relied on (i) the time-hon-

ored principle of grand jury secrecy, (ii) the case of In re Grand Jury Proceedings (Field), 532 F. 2d 404 (5th Cir.), cert. denied, 429 U.S. 940 (1976) (witness must testify before United States grand jury even though it could subject him to criminal punishment in the Grand Cayman Islands), and (iii) the assurances of confidentiality from Mr. Mescon, and decided not to move to quash the grand jury subpoena. Encouraging voluntary and candid testimony before the grand jury, as mentioned supra, is essential to our grand jury system. Ordering disclosure in this case would serve to frustrate this system.

The Second Circuit in In re Grand Jury Subpoena of Martin Flanagan, deviated from the holdings in other circuits and refused to accept Fed. R. Crim. P. 6(e) as an effective deterrent to eliminating the risk that grand jury testimony will be used abroad to prosecute a witness. Slip op. at 58, 60. In re Baird, 668 F. 2d 432,

434 (8th Cir.), cert. denied, 102 S. Ct. 2255 (1982); United States v. Brummitt, 665 F. 2d 521, 524-26 (5th Cir. 1981), cert. denied, 102 S. Ct. 2244 (1982). However, continued refusal of district courts to disclose testimony consistent with Fed. R. Crim. P. 6(e) absent a particularized need which overwhelms the public interest will increase "the likelihood . . .that the tradition of grand jury secrecy, which is 'older than the Nation itself', Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 339 (1959), will not be cavalierly disregarded." In re Grand Jury Subpoena of Martin Flanagan, slip op. at 62 (Van Graafeiland, J. concurring).

Even if the information sought by the applicant is not available from other sources, [4/] a hypothesis strongly contested by the respondent, the need applicant has demonstrated for [Doe's] testimony does not outweigh the public need to retain secret grand jury proceedings. If the contested testi-

mony were released to aid a private party in a civil litigation to reduce its liabilities, then Fed. R. Crim. P. 6(e)(3)(c) would be reduced to mere extension of the already broad federal discovery rules. The public interest in maintaining secrecy and thus upholding the integrity of the grand jury systems outweighs the need of the applicant to establish the beneficial ownership of Bland.

Accordingly, the applicant's motion for release of [Doe's] grand jury testimony is denied.

SO ORDERED.

Dated: New York, New York
October 26, 1982

/s/

KEVIN THOMAS DUFFY, U.S.D.J.

FOOTNOTES

1/ The government takes no position on the instant disclosure motion.

2/ Respondent argues that the proceeding in the Grand Court of the Cayman Islands is not a "judicial proceeding" within the meaning of Fed. R. Civ. P. 6(e)(3)(c). No authority is offered for the respondent's contention. It is undisputed that a case involving these parties is pending in the recognized courts of the Cayman Islands. This case qualifies as a "judicial proceeding" for the purposes of this application.

3/ Applicant unsuccessfully contends that due to its appointment as trustee under the Securities Investor Act of 1970 it is essentially performing a public good -- recoupment of monies owed to creditors and the

Footnote continued on following page

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Securities Investor Protection Corporation, the subrogee -- which entitles him to be held to a less rigorous standard in gaining access to [Doe's] testimony. While the considerations justifying the continued secrecy of grand jury testimony may become less relevant when an independent and impartial public body is involved, some necessity for the confidential information must still be demonstrated. United States v. Sobotka, 623 F. 2d at 767. Thus, even if the applicant, a semi public insurance company deriving its funds from the securities industry, were an impartial public body, which it is not, a necessity for disclosure which override policy concerns must still be proven.

4/ Respondent argues that interrogatories, pretrial discovery and/or judicial remedies can be utilized by applicant to obtain the

Footnote continued on following page

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desired information. Applicant argues that all means available are ineffectual. My decision that no particularized need justifies the disclosure of [Doe's] testimony makes it unnecessary to extensively explore Grand Caymanian pretrial procedures. Obviously, if there is no compelling necessity to make [Doe's] statements public, other available sources of the information are immaterial.

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-second day of April, one thousand nine hundred and eighty-three.

- -X

IN RE APPLICATION OF EXECUTIVE SECURITIES CORPORATION.

EXECUTIVE SECURITIES CORPORATION, by CAMERON F. MACRAE,III, as Trustee, No. 82-6286

Applicant-Appellant,

v.

JOHN DOE,

Objector-Appellee.

- -X

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the objector-appellee, John Doe,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion fo rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk
by:

/s/
Francis X. Gindhart,
Chief Deputy Clerk

No. 82-1881

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN DOE,

Petitioner,

—v.—

EXECUTIVE SECURITIES CORPORATION,
BY CAMERON F. MACRAE, III, AS TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

When a full reading of the decision of the United States Court of Appeals for the Second Circuit demonstrates that the Court of Appeals scrupulously followed *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), and the other precedents of this Court which establish the standards for releasing grand jury transcripts, should this Court nonetheless review that decision on *certiorari*, solely because the Court of Appeals failed to state, in so many words, that the District Court "abused its discretion" when it refused to release the grand jury transcripts?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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OCTOBER TERM, 1982

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—v.—

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BY CAMERON F. MACRAE, III, AS TRUSTEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondent Cameron F. MacRae, III (hereinafter, the "Trustee"), as trustee for Executive Securities Corporation ("Executive"), submits this brief in opposition to the petition for a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit in *Application of Executive Securities Corporation*, 702 F.2d 406 (2d Cir. 1983).

STATEMENT OF THE CASE

A. The Nature of the Proceedings

In the decision which Petitioner John Doe (hereinafter "Doe") asks this Court to review on *certiorari*, the United States Court of Appeals for the Second Circuit held that the transcripts of testimony which Doe gave before a federal grand jury should be released to Respondent, who is the court-appointed Trustee for Executive, a broker-dealer being liquidated pursuant to the Securities Investor Protection Act of 1970, 15 U.S.C. § 78aaa *et seq.*

Although the Second Circuit was careful to point out that "witnesses do not have the prerogative to effect the release of the transcripts of their own grand jury testimony," 702 F.2d at 408-409, the Second Circuit found it "highly significant" that Doe had "waived his right to object to the release of the [grand jury] records," 702 F.2d at 409, by agreeing to the entry of a consent order which provided for the release of Doe's testimony if Doe (who is a lawyer) or his law firm disputed certain factual allegations which the Trustee made in a fraudulent conveyance action pending in the Cayman Islands. Because Doe had admittedly breached his agreement not to contest these facts, the Second Circuit found that the Trustee had a particularized need for Doe's grand jury testimony for use in the Cayman Island proceedings, and, after examining all relevant factors, the court held that the Trustee's need for the transcripts outweighed "the minimal public interest in grand jury secrecy in this case. . . ." 702 F.2d at 410.

In striking this balance, the Second Circuit rejected Doe's argument, which Doe also raises in this Court, that release of Doe's testimony would discourage future witnesses from testifying freely and voluntarily before a grand jury. The Second Circuit observed that Doe, unlike the typical grand jury witness, had waived his interest in the confidentiality of his grand jury testimony by an agreement which Doe made after he had

testified, with full knowledge both of the contents of his testimony and of the possible implications of its release. Thus, despite Doe's arguments that the Second Circuit's decision will have far-reaching implications, the decision below will have no chilling effect on future grand jury witnesses because, as the Second Circuit correctly observed, "[p]rospective witnesses can be assured that their desire for secrecy will be given all due consideration, as long as they do not enter into a similar waiver." 702 F.2d at 409 (footnote omitted).

B. Proceedings Before the District Court

The background of this controversy is fully described in the opinion of the Second Circuit and will be briefly summarized here.

The Trustee was appointed by the United States District Court for the Southern District of New York on the motion of the Securities Investor Protection Corporation ("SIPC"), and has been pursuing litigation on Executive's behalf against Executive's former president, Richard O. Bertoli. Mr. Bertoli, however, has claimed to be impoverished and unable to pay any judgment which the Trustee may obtain against him. 702 F.2d at 406.

In April, 1981, the United States Attorney for the Southern District of New York obtained an *ex parte* order which allowed him to disclose to the Trustee certain grand jury records, including the transcript of Doe's testimony. The grand jury material revealed that Mr. Bertoli had fraudulently transferred $210,000 to Bland Investments, S.A. ("Bland"), a Cayman Island corporation. Doe, an officer of Bland and a Cayman Island attorney, had testified to the grand jury that the beneficial owner of Bland was one Alfred B. Averell, "a close business associate of Bertoli's and a former vice president of Executive." 702 F.2d at 408. Armed with this information, the Trustee prepared to file a fraudulent conveyance action in the Cayman Islands to recover the $210,000 which was transferred to Bland. 702 F.2d at 407-408.

Before the Cayman Islands action could be commenced, Doe appeared by counsel in the Southern District of New York and made an application to reseal his grand jury testimony, arguing that he might be subject to prosecution in the Cayman Islands for having revealed the identities of Bland's principals in violation of the Cayman Islands Confidential Relationship (Preservation) Law. Doe's motion was not decided, however, because Doe and the Trustee entered into a stipulation, endorsed as a consent order by Judge Edelstein, which resealed Doe's testimony on the following terms:

> [A]s long as [Doe] and his law firm concede and do not deny in any litigation in the Cayman Islands that insofar as their knowledge extends, Alfred B. Averell was at all material times the beneficial owner of Bland Investments, S.A., the United States Attorney for the District shall not release or divulge to any person or entity the transcript of any testimony by [Doe] before a federal grand jury on December 1, 1980.

The order also specified that a further order from the District Court would be necessary to reopen the sealed record. 702 F.2d at 408.

Thereafter, the Trustee commenced a fraudulent conveyance action in the Cayman Islands, and despite the agreement which had been reached in the District Court, Doe's law firm, representing both Bland and Averell, "promptly breached the condition of the consent order by denying that Averell was the beneficial owner of Bland Investments." 702 F.2d at 408. Moreover, Doe's firm counterclaimed against the Trustee for $200,000 alleging wrongful interference with Bland's business affairs. 702 F.2d at 408.

The Trustee then returned to the District Court to request the reopening of the grand jury transcripts, but the District Court denied that application. Judge Duffy first held that because a witness cannot stipulate to the release of his grand jury testimony, the consent order entered by Judge Edelstein

was not self-executing. The District Court then attempted to balance the need for disclosure of the grand jury testimony against the interests protected by grand jury secrecy and denied the Trustee's request for disclosure because, *inter alia*, release of the transcripts might subject Doe to prosecution under the Cayman Islands secrecy laws. 702 F.2d at 408.

C. The Second Circuit's Decision

The Trustee appealed the District Court's order denying the release of Doe's grand jury testimony to the United States Court of Appeals for the Second Circuit, and a panel composed of Judges Kaufman, Timbers and Newman unanimously reversed.

The Second Circuit agreed with the District Court that a grand jury witness cannot stipulate to the release of his testimony, pointing out that this Court had held in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211 (1979), that grand jury secrecy serves a number of societal interests in addition of those of the witness. However, the Second Circuit held that the District Court erred "in its conclusion that, because Doe could not effectively agree to release his testimony, his stipulation was without legal significance." 702 F.2d at 409.

The Second Circuit observed that "Doe entered into this consent agreement with full knowledge of the risk of prosecution under Cayman law if a breach of the agreement were to result in release of his testimony." 702 F.2d at 409 (footnote omitted). The Second Circuit then held that Doe's acquiescence in the agreement had the legal effect of waiving any interest he himself might have in maintaining the secrecy of his testimony:

> By using the agreement to secure Judge Edelstein's granting of the motion to reseal, Doe waived his right to have another District Judge consider whatever interest he personally might have in keeping his grand jury testimony secret. Doe's agreement to have his testimony released if his law firm denied Averell's ownership distinguished him

> from an ordinary grand jury witness seeking to keep testimony secret.

702 F.2d at 409.

Having thus held that the District Court erred when it relied on factors of individual concern to Doe, such as his fear of prosecution, the Second Circuit then considered the relevance of the more general societal interests served by grand jury secrecy, which this Court identified in its *Douglas Oil* opinion. The Second Circuit first noted that the government, which normally asserts "any significant public interest in maintaining the secrecy of grand jury records" had initiated the release of Doe's testimony to the Trustee and took no position on the appeal. 702 F.2d at 409, n. 3.

As mentioned above, the Second Circuit rejected Doe's principal argument that release of Doe's testimony would deter future witnesses from cooperating with the grand jury, because Doe was in the highly unusual posture of having voluntarily waived his interest in confidentiality, and other witnesses could protect themselves by declining to enter into similar waivers. 702 F.2d at 409.

The Second Circuit also found that "other traditional justifications" for grand jury secrecy "are inapplicable in this case." 702 F.2d at 410. The court noted that there was no danger that the grand jury would be influenced by the release of Doe's transcript, because the grand jury's term had expired, and the Trustee had agreed to the redaction of the grand jurors' names from the grand jury records. Further, release of Doe's transcript would not warn the target of the grand jury investigation, Averell, of the pendency of the investigation, because Averell already knew of the investigation and had appeared in the District Court to oppose the release of the grand jury records. 702 F.2d at 410.

The only interest in maintaining grand jury secrecy which the Second Circuit found applicable in this case was the "possibility that Averell's reputation might be tainted by the

release of the news that he was under grand jury investigation." 702 F.2d at 410. While the Second Circuit "[did] not discount the significance of this concern," 702 F.2d at 410, it found that it was outweighed by the Trustee's need for the records. The court accepted the Trustee's "explanations why Cayman discovery offers no alternative means of discovering the information revealed in Doe's testimony," 702 F.2d at 410, n. 6, and that Doe's testimony was necessary not only to pursue the Trustee's own claims in the Cayman Islands, but to defend the Trustee from Bland's counterclaim, asserted by Doe's law firm, that the Trustee had interfered wrongfully with Bland's business.

Finally, the Second Circuit observed that "SIPC and its trustees vindicate important public interests," and that although the Trustee's status "does not, without more, establish his entitlement to release of Doe's grand jury testimony, it is a factor to be weighed in the *Douglas Oil* balancing test." 702 F.2d at 410 (citations omitted).

Having thus completed the balancing test required by *Douglas Oil*, the Second Circuit "conclude[d] that the applicant is entitled to the release of the [grand jury] records." 702 F.2d at 410. Doe's petition for rehearing and suggestion for rehearing *en banc* was denied on April 22, 1983. Doe then submitted his petition for a writ of *certiorari* to this Court. His petition was accompanied by a motion for a stay which was denied by Justice Marshall on May 23, 1983.

REASONS FOR DENYING THE WRIT

The Second Circuit Carefully Followed The Precedents Of This Court, And Even If It Did Not, The Issues Raised In The Petition Are Too Insubstantial To Warrant Review Here.

Although Doe's petition for a writ of *certiorari* relies entirely on supposed inconsistencies between the Second Circuit's decision and this Court's opinion in *Douglas Oil Co. v. Petrol Stops Northwest*, 411 U.S. 211 (1979), the Second Circuit was fully cognizant of the *Douglas Oil* decision and quoted from it at length. 702 F.2d at 409. The Second Circuit recognized that *Douglas Oil* required the application of a balancing test which weighed the need that the Trustee had demonstrated for the release of grand jury materials against the traditional interests that are served by grand jury secrecy. 704 F.2d at 410. The Second Circuit considered each of the justifications for grand jury secrecy which had been discussed in the Court's *Douglas Oil* decision, and found that those considerations either were not presented by the case at hand, or were outweighed by the need for disclosure. Both the analysis which the Second Circuit followed, and the result which it reached, are fully consistent with *Douglas Oil*.

Doe nonetheless argues that the Court should review the Second Circuit's decision on *certiorari* because, according to Doe's petition, "the Court of Appeals did not give proper deference to the exercise of discretion by the District Court, but usurped its function and merely substituted its own desires instead." Petition for Writ at 19. However, as this Court emphasized in *Douglas Oil*, the "abuse of discretion" standard which is applied on appeals from grand jury disclosure orders does not prevent the appellate courts from correcting a clearly erroneous decision by the District Court:

> Generally we leave it to the considered discretion of the district court to determine the proper response to requests

> for disclosure under Rule 6(e). *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. at 399. We have a duty, however, to guide the exercise of discretion by district courts, and when necessary to overturn discretionary decisions under Rule 6(e). *See, e.g., Dennis v. United States*, 384 U.S. 855 (1966).

441 U.S. at 228.

Doe argues that the Second Circuit applied the wrong appellate standard because "[t]here is no discussion anywhere in the Court of Appeals opinion whether the District Court abused its discretion, nor is there any holding to that effect." Petition for Writ at 18-19. That criticism, however, is equally applicable to this Court's decision in *Dennis v. United States*, 384 U.S. 855 (1966), cited with approval in the passage from *Douglas Oil* quoted above. In *Dennis*, the Court reversed the District Court's refusal to release grand jury transcripts, without ever explicitly discussing the question of whether the District Court had abused its discretion. The Trustee respectfully submits that when read in full context, the Second Circuit's decision, like the Court's decision in *Dennis*, reveals that the "abuse of discretion" standard has been properly applied.

Under the "abuse of discretion" standard, the Court of Appeals should not "reweigh the equities or reassess the facts," but it has the responsibility "to make sure that the conclusions derived from those weighings and assessments are juridically sound and supported by the record." *Curtis-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10 (1980). Although the line between these two functions is sometimes difficult to draw, the Second Circuit in this case properly limited itself to the latter. The Second Circuit did not, as Doe suggests, merely reassess the relative weights which the District Court assigned to the various factors bearing on the release of Doe's grand jury testimony. Rather, the Second Circuit identified a fundamental legal error in the District Court's analysis, which led the District Court to assess the issues raised by the Trustee's application in a way which was not "juridically sound."

As discussed above, the Second Circuit decided that the District Court erred, as a matter of law, when it found that because Doe could not stipulate to the release of his grand jury testimony, his agreement with the Trustee was of no legal significance whatsoever. The Second Circuit held that, to the contrary, the agreement had the effect of waiving any interest which Doe *personally* had in maintaining the secrecy of his grand jury testimony. When the Second Circuit performed its own *Douglas Oil* balancing test, excluding factors which were personal to Doe (such as his concern for prosecution in the Cayman Islands), it did so not because it felt the District Court had assigned these factors too great a weight, but because it was erroneous for the District Court to have considered such factors *at all* in view of Doe's waiver. The Court of Appeals thus corrected a basic error of law in the District Court's analysis, rather than merely substituting its judgment for the District Court's, and its decision is therefore fully consistent with an "abuse of discretion" standard of review.

To the extent that Doe's petition seeks to raise issues other than the question of whether the Second Circuit applied the proper standard of review, Doe does nothing more than quarrel with the way in which that court applied the balancing test required by *Douglas Oil*. For example, Doe argues that the Trustee failed to demonstrate "particularized need" for the release of Doe's transcript, Petition for Writ at 19-20, but the Second Circuit accepted the Trustee's showing that the limited pretrial discovery devices available in the Cayman Islands did not provide the Trustee with an alternative means of obtaining the information revealed in Doe's testimony. 702 F.2d at 410, n. 6. Doe's petition also argues the release of Doe's testimony might deter future witnesses from cooperating with grand jury investigations, Petition for Writ at 21-27, but the Second Circuit limited its holding to the facts of this particular case, in which Doe had voluntarily entered into an agreement that waived his interest in the confidentiality of his testimony, and the Second Circuit expressly pointed out that other "[p]rospective witnesses can be assured that their desire for

secrecy will be given all due consideration, as long as they do not enter into a similar waiver." 702 F.2d at 409 (footnote omitted).

In short, the Second Circuit faithfully adhered to the principles articulated in *Douglas Oil* and its progeny, and the petition for a writ of *certiorari* should be denied. However, even if Doe had succeeded in identifying errors in the Second Circuit's analysis, the decision below should not be reviewed by this Court, because the facts before the Second Circuit were *sui generis*. The Second Circuit's decision turned on Doe's voluntary agreement to waive his interest in grand jury secrecy if he or his law firm disputed the Trustee's factual allegations in the Cayman Islands litigation. Because the typical grand jury witness is extremely unlikely to enter an agreement of this sort (and then violate it), the Second Circuit's decision is of limited precedential significance, and even if the Second Circuit had erred (which it did not), its decision therefore would not merit this Court's review.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Dated: New York, New York
June 20, 1983

Respectfully submitted,

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